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8 **UNITED STATES DISTRICT COURT**  
9 **NORTHERN DISTRICT OF CALIFORNIA**  
10 **SAN FRANCISCO DIVISION**

11  
12 Charles Baird and Lauren Slayton, as  
individuals, and on behalf of all others  
13 similarly situated, and on behalf of the  
BlackRock Retirement Savings Plan,

14 Plaintiffs,

15 vs.

16 BlackRock Institutional Trust Company,  
N.A.; BlackRock, Inc.; The BlackRock, Inc.  
17 Retirement Committee; The Investment  
Committee of the Retirement Committee;  
18 Catherine Bolz, Chip Castille, Paige Dickow,  
Daniel A. Dunay, Jeffrey A. Smith; Anne  
19 Ackerley, Amy Engel, Nancy Everett, Joseph  
Feliciani Jr., Ann Marie Petach, Michael  
20 Fredericks, Corin Frost, Daniel Gamba, Kevin  
Holt, Chris Jones, Philippe Matsumoto, John  
21 Perlowski, Andy Phillips, Kurt Schansinger,  
and Tom Skrobe.

22 Defendants.  
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**NOTICE OF MOTION AND MOTION FOR  
RELIEF UNDER FED. R. CIV. P. 56(D)**

No. 4:17-cv-01892-HSG

Hearing Date: January 11, 2018

Time: 2:00 p.m.

Place: Courtroom 2, Oakland Courthouse

Judge: Honorable Haywood S. Gilliam, Jr.

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**NOTICE OF MOTION AND MOTION**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 11, 2018, at 2:00 p.m., or as soon thereafter as this matter may be heard, in Courtroom 2 of the United States District Court for the Northern District of California, located at 1301 Clay Street, Oakland, California, 94612, before the Honorable Haywood S. Gilliam, Jr., Plaintiffs Charles Baird and Lauren Slayton, individually and on behalf of all others similarly situated and on behalf of the BlackRock Retirement Savings Plan and other CTI Class plans (“Plaintiffs”) will and hereby do move this Court for Relief pursuant to Federal Rule of Civil Procedure 56(d).

The motion is made on the grounds that Defendants’<sup>1</sup> Motion to Dismiss Plaintiffs’ Amended Class Action Complaint seeking Summary Judgment in the alternative (“MTD,” ECF No. 79) is premature. The motion should be denied or alternatively, deferred until the close of discovery. To date, the parties have engaged in very limited discovery and a number of key disputed facts remain to be discovered regarding, among other things, Defendants’ fiduciary decision making process and the total costs associated with BTC-managed investments. Furthermore, Defendants seek summary judgment based on unsupported factual assertions, many of which are undermined by the Defendants’ own documents. Because Plaintiffs have not been afforded a meaningful opportunity to discover facts essential to their claims, they are entitled to relief under Rule 56(d).

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<sup>1</sup> BlackRock Institutional Trust Company, N.A.; BlackRock, Inc.; The BlackRock, Inc. Retirement Committee; The Investment Committee of the Retirement Committee; Catherine Bolz, Chip Castille, Paige Dickow, Daniel A. Dunay, Jeffrey A. Smith; Anne Ackerley, Amy Engel, Nancy Everett, Joseph Feliciani Jr., Ann Marie Petach, Michael Fredericks, Corin Frost, Daniel Gamba, Kevin Holt, Chris Jones, Philippe Matsumoto, John Perlowski, Andy Phillips, Kurt Schansinger, and Tom Skrobe. (“Defendants” or “BlackRock”).

1 This motion is made pursuant to Federal Rule of Civil Procedure 56(d), and is supported by  
2 the accompanying memorandum of points and authorities, the declaration of Mary J. Bortscheller  
3 with exhibits thereto, and the Opposition to Defendants' Motion to Dismiss, all filed concurrently  
4 herewith; all records and pleadings on file with the Court; all further evidence and oral argument that  
5 may be presented at the hearing on this motion; and all other matters as the Court deems proper.  
6

7 Dated: December 8, 2017

Respectfully submitted,

8  
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Defendants' Motion to Dismiss Plaintiffs' Amended Class Action Complaint ("MTD") seeks  
4 Summary Judgment in the alternative. ECF No. 79. A motion for summary judgment at this stage of  
5 the litigation is premature and should be denied, or in the alternative, deferred until the close of  
6 discovery. Nothing in the MTD, or in the over 6,700 pages attached to it, establishes the absence of a  
7 genuine issue of material fact regarding the breaches of fiduciary duty and prohibited transactions  
8 alleged in Plaintiffs' Amended Class Action Complaint ("Amended Complaint" or "AC" ECF No.  
9 71-2). To the contrary, a number of key disputed facts remain to be discovered, such as: did  
10 Defendants engage in a prudent and loyal fiduciary decision-making process when they selected  
11 nearly all BlackRock proprietary funds for inclusion in the BlackRock Plan? Did Defendants  
12 adequately consider available alternative options? Did Defendants engage in prohibited transactions  
13 by purchasing shares, units or interests in the BlackRock proprietary funds, or by transferring the  
14 Plan's assets to Plan fiduciaries BTC or BlackRock? What are the total fees and costs that  
15 participants in the BlackRock Plan pay for their investments in the BlackRock proprietary funds?  
16 What are the total fees and costs that members of the CTI Class<sup>2</sup> pay for their investments in the  
17 BlackRock CTIs<sup>3</sup>?

18 Defendants' MTD seeks summary judgment in the alternative, notwithstanding the fact that  
19 they have not produced any electronically-stored information ("ESI"), and despite the fact that  
20 Plaintiffs have issued numerous discovery requests to Defendants that remain outstanding. As  
21 outlined herein and in the Declaration of Mary J. Bortscheller ("Bortscheller Decl.") attached hereto  
22 as Exhibit 1, Plaintiffs have not yet had a meaningful opportunity to fully discover the facts required

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<sup>2</sup> The "CTI Class" includes all participants, and their beneficiaries, whose individual accounts were  
27 invested in the BlackRock CTIs (*see* n.3, *infra*) from April 5, 2011 to the present.

28 <sup>3</sup> "BlackRock CTIs" refer to 42 separate collective trust investments ("CTIs") into which the  
individual accounts of Plaintiffs and the CTI Class were invested, listed at AC ¶ 231.

1 to prove their claims nor to respond to Defendants’ Rule 56 motion, despite their diligent, good faith  
2 efforts. Although Defendants have produced certain BlackRock Plan-related documents, document  
3 production is far from complete. The parties have been meeting and conferring for months regarding  
4 the search terms and custodians to be used to search Defendants’ ESI for material responsive to  
5 Plaintiffs’ First Request for Production of Documents (“RFP”) issued on August 17, 2017. The  
6 limited discovery Defendants have provided to date offers little insight into their decision-making  
7 processes or the total costs BlackRock Plan participants pay for their retirement investments.  
8

9 To enter summary judgment against a party without providing that party an opportunity to  
10 obtain meaningful discovery would be manifestly unjust. Here, Defendants’ MTD rests on various  
11 untested factual assertions, such as the contention that the BlackRock collective trust funds in the  
12 Plan are “fee-free” (*see* MTD at 1) and that participants “pay *no investment management fees at*  
13 *any level*” (*Id.*, emphasis original). But the documents that Defendants submit in support of these  
14 factual assertions indicate that there are numerous genuine disputes about their veracity. Indeed, the  
15 documents raise rather than resolve factual disputes, because they contain statements that actually  
16 undermine Defendants’ position that there are no fees paid in connection with the BlackRock  
17 proprietary collective trust funds. Summary judgment would be highly inappropriate under such  
18 circumstances.  
19

20  
21 Because Plaintiffs have not been afforded a meaningful opportunity to discover facts relevant  
22 to their claims, Defendants’ premature attempt to obtain summary judgment should be denied. In the  
23 event this Court does not deny summary judgment outright, Plaintiffs request that the Court defer  
24 consideration of Defendants’ summary judgment motion until the parties are able to complete the  
25 necessary discovery pursuant to Fed. R. Civ. P. 56(d).  
26

## 27 **II. PROCEDURAL BACKGROUND**

28

1 On April 5, 2017, Plaintiff Charles Baird filed a Complaint against BlackRock and several  
2 other defendants. ECF No. 1. Pursuant to ERISA § 104(b), 29 U.S.C. 1024(b), Plaintiff Baird made a  
3 request for BlackRock Plan-related documents on April 28, 2017 and BlackRock provided those  
4 documents on May 26, 2017 (“104(b) Documents”). Bortscheller Decl. ¶ 2. Defendants filed a  
5 Motion to Dismiss (ECF No. 35) on June 1, 2017, and by order of this Court, discovery commenced  
6 while the parties briefed that motion. ECF No. 62. After a detailed review and investigation of the  
7 104(b) Documents and additional publicly-available documents, Plaintiffs discovered additional  
8 claims on behalf of the CTI Class. Bortscheller Decl. ¶ 3. The Amended Complaint, which pleads  
9 the CTI Class claims and also names Lauren Slayton as a plaintiff, was filed with Defendants’  
10 consent on October 18, 2017. ECF 71-2.  
11

12 Meanwhile, the parties agreed to and proposed a joint discovery schedule, later entered by  
13 the Court, in which fact discovery closes March 9, 2018 and expert discovery closes on June 8,  
14 2018. ECF No. 62. Since that time, the parties have initiated substantial discovery, but this discovery  
15 remains largely incomplete. *See* Bortscheller Decl. ¶ 4. Plaintiffs have issued three sets of  
16 interrogatories and two sets of requests for production, the latest of which issued on November 20,  
17 2017 and remains outstanding as of the date of this filing. On December 5, 2017, Plaintiffs issued  
18 143 separate requests for admission (“RFAs”) on Defendants. *Id.* ¶ 9.<sup>4</sup>  
19

20 No depositions, by either party, have taken place thus far. *Id.* ¶ 23. On October 31, 2017,  
21 Plaintiffs issued a Rule 30(b)(6) deposition notice to Defendant BlackRock, Inc., which sets forth 18  
22 topics for corporate testimony. *Id.* ¶ 24. Defendants responded and objected to the notice on  
23

24  
25 <sup>4</sup> Defendants have responded and objected to all but the most recent November 20, 2017 and  
26 December 5, 2017 discovery requests. *Id.* ¶¶ 5-9 Defendants also issued requests for production.  
27 Plaintiffs have responded in writing and are preparing to produce documents pursuant to those  
28 requests, though given the nature of this ERISA breach of fiduciary duty case, the vast majority of  
the relevant material is in the hands of Defendants. *Id.* ¶¶ 21-22. Defendants issued Interrogatories,  
which Plaintiffs will respond to after this motion is filed.

1 November 21, 2017 but no depositions have yet been scheduled pursuant to the notice. *Id.* ¶ 25.  
2 Plaintiffs understand that Defendants’ production of documents is ongoing, in light of the ongoing  
3 meet and confer process regarding Plaintiffs’ First RFP, and the outstanding November 20 RFPs.  
4 December 15, 2017 is the deadline for “[s]ubstantial completion of document discovery” in the case.  
5 ECF No. 62.  
6

### 7 **III. ARGUMENT**

#### 8 **A. Legal Standard**

9 Federal Rule of Civil Procedure 56(d)<sup>5</sup> provides that, when faced with a motion for summary  
10 judgment, the non-moving party may ask the court to defer consideration of the motion or deny it;  
11 allow time to take discovery; or issue any other appropriate order. Fed. R. Civ. P. 56(d). Rule 56(d)  
12 “was designed to ensure that a nonmoving party will not be forced to defend a summary judgment  
13 motion without having an opportunity to marshal supporting evidence.” *Freeman v. ABC Legal*  
14 *Servs. Inc.*, 827 F. Supp. 2d 1065, 1070 (N.D. Cal. 2011) (internal quotation omitted).  
15

16 To prevail on a Rule 56(d) motion for discovery, the moving party need only show that: “(1)  
17 it has set forth in affidavit form the specific facts it hopes to elicit from further discovery; (2) the  
18 facts sought exist; and (3) the sought-after facts are essential to oppose summary judgment.”  
19 *Freeman*, 827 F. Supp. 2d at 1071 (quoting *Family Home & Fin. Ctr., Inc. v. Fed. Home Loan*  
20 *Mortg. Corp.*, 525 F.3d 822, 827 (9th Cir. 2008); see also *Marentes v. State Farm Mut. Auto. Ins.*  
21 *Co.*, 224 F. Supp. 3d 891, 924–25 (N.D. Cal. 2016). Rule 56(d) allows a court to deny or postpone a  
22 motion for summary judgment when “the nonmoving party has not had an opportunity to make full  
23 discovery.” *United States v. Real Prop. & Improvements Located at 2366 San Pablo Ave., Berkeley,*  
24 *California*, No. 13-CV-02027-JST, 2014 WL 3704041, at \*1–2 (N.D. Cal. July 24, 2014) (citing  
25 *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986)).  
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28 <sup>5</sup> Formerly, Rule 56(f).

1           **B. Plaintiffs Are Entitled to Relief Pursuant to Rule 56(d).**

2           Courts in this Circuit are reluctant to deny 56(d) requests in cases like this one. *Freeman*, 827  
 3 F. Supp. 2d at 1071 (noting that unless the party seeking 56(d) relief “failed to exercise due diligence  
 4 in conducting discovery, filed an untimely Rule 56(d) request, or failed to explain how additional  
 5 facts would oppose summary judgment, the request is generally granted with liberality.”) (collecting  
 6 Northern District cases granting 56(d) relief). Despite ongoing good faith efforts, Plaintiffs have “not  
 7 had an opportunity to make full discovery” into (among other things) Defendants’ fiduciary  
 8 decision-making process and the existence of various types of investment costs (apart from  
 9 investment management fees) that Defendants forced plan participants to pay to BlackRock and its  
 10 affiliates from their retirement savings. *Real Prop. & Improvements Located at 2366 San Pablo*  
 11 *Ave., Berkeley, California*, 2014 WL 3704041, at \*1–2. As set forth herein and in the attached  
 12 Bortscheller Declaration, Plaintiffs are in the process of eliciting a number of facts critical to their  
 13 claims from continued discovery. Plaintiffs have reason to believe that these facts exist. And, finally,  
 14 the sought-after facts are “essential . . . to oppose summary judgment.” *Id.* at \*2. Plaintiffs are  
 15 therefore entitled to relief pursuant to Rule 56(d).  
 16  
 17

18           1.       As the Accompanying Declaration Makes Clear, Plaintiffs Need Specific,  
 19                   Additional Facts to Prove Their Claims.

20           Plaintiffs continue to seek discovery regarding the claims of the BlackRock Plan Class and  
 21 the CTI Class. With respect to the BlackRock Plan Class, the parties have been engaged in a  
 22 protracted meet and confer process regarding Plaintiffs’ First RFP,<sup>6</sup> issued August 17, 2017.  
 23 Bortscheller Decl. ¶ 7. Though Defendants have produced some documents in response, Defendants  
 24 have yet to produce any responsive correspondence, board books, or sub-committee meeting minutes  
 25 to date, as the parties have been negotiating the scope and terms of the ESI search process for  
 26  
 27

28           <sup>6</sup> The First RFP consists of 17 separate requests. Bortscheller Decl. ¶ 7.



1 months. *Id.* ¶ 14.<sup>7</sup> The communications between/among committee members and third parties are  
2 integral to Plaintiffs’ breach of fiduciary duty claims, and without an examination of those  
3 communications Plaintiffs and the Court cannot determine whether the process for considering,  
4 selecting, monitoring, and removing investment options for the Plan was imprudent. *Id.* ¶ 27.  
5

6 The limited discovery Plaintiffs have obtained thus far offers little insight into Defendants’  
7 decision-making process or the total costs BlackRock Plan participants pay for their retirement  
8 investments. [REDACTED]

9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]

21 [REDACTED] Defendants have not produced this or *any* other e-mail. Granting summary  
22 judgment before Plaintiffs have had an opportunity to discover all relevant communications

23 \_\_\_\_\_  
24 <sup>7</sup> During the meet and confer process related to Plaintiffs’ First Request for Production, Defendants  
25 took the position that they would not begin to search for and produce ESI until the parties could  
26 reach agreement on every disputed issue, ranging from the relevant time period applicable to the  
27 discovery requests, to the number and identities of Defendants’ document custodians, and the  
28 parameters of the search strings. Bortscheller Decl. ¶ 15.

<sup>8</sup> However, Defendants still have not produced effectively any minutes for the Retirement  
Committee meetings. Bortscheller Decl. ¶ 13. This discovery is relevant to Plaintiffs’ claims because  
the Retirement Committee members are Plan fiduciaries who were responsible, inter alia, for  
monitoring the performance of their appointees serving on the Investment Committee.

1 regarding the decision-making process for evaluating, selecting, retaining, and/or replacing funds in  
2 the BlackRock Plan would be prejudicial to Plaintiffs, given evidence that the meeting minutes do  
3 not record all of the substantive deliberations of the Investment Committee. *See Burlington N. Santa*  
4 *Fe R.R. Co v. Assiniboine and Sioux Tribes of Fort Peck Reservation.*, 323 F.3d 767, 774 (9th Cir.  
5 2003) (noting that where “documentation or witness testimony may exist that is dispositive of a  
6 pivotal question . . . lightning-quick summary judgment motions can impede informed resolution of  
7 fact-specific disputes.”). Plaintiffs are entitled to fully discover the substance of the committee  
8 members’ deliberations and decision making process when selecting and maintaining virtually all  
9 BlackRock funds in the Plan. This discovery requires the production of email and other  
10 correspondence regarding the decision-making process, responses to interrogatories and depositions.  
11 Bortscheller Decl. ¶ 28.

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13  
14 Defendants seek summary judgment before Plaintiffs have been able to take even one  
15 deposition. *Id.* ¶ 23. Plaintiffs’ October 31, 2017 30(b)(6) deposition notice to Defendant BlackRock  
16 sets out several areas of inquiry relevant to the BlackRock Plan Class, including “[t]he processes for  
17 selecting, retaining, maintaining, and removing investment options for the Plan during the Relevant  
18 Period, including all practices, policies, and procedures regarding same, including but not limited to  
19 practices or procedures of the Board, the Retirement Committee, and/or the Investment Committee.”  
20 *Id.* at ¶ 26. This information is critical to Plaintiffs’ claims, but the date for these depositions will be  
21 *after* the MTD is fully briefed and heard by the Court. *Id.* at ¶ 25.

22  
23 Moreover, Plaintiffs have had virtually no opportunity to discover facts relevant to their CTI  
24 Class claims, as the discovery requests issued on November 20 and the RFAs issued on December 5  
25 remain outstanding. *Id.* ¶¶ 8-9. This weighs in favor of Plaintiffs’ request for Rule 56(d) relief,  
26 as “[s]ummary denial [of a Rule 56(d) motion] is especially inappropriate where . . . the material  
27 sought is also the subject of outstanding discovery requests.” *Real Prop. & Improvements Located at*  
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1 2366 San Pablo Ave., Berkeley, California, 2014 WL 3704041, at \*2 (quoting *Burlington*, 323 F.3d  
2 at 775). These discovery requests set forth in detail factual information which Plaintiffs need for  
3 their claims asserted on behalf of the CTI Class. Bortscheller Decl. at ¶11 (attaching discovery  
4 requests at Group Attachment A). For example, the following pending interrogatory makes clear just  
5 how premature Defendants' motion is, as Plaintiffs await the identification of relevant witnesses and  
6 document custodians: "Identify all Persons employed by BlackRock, a BlackRock subsidiary, or a  
7 BlackRock affiliate that make or made any decisions regarding the management of the assets in any  
8 of the BlackRock CTIs during the Relevant Time Period." *Id.* at ¶ 8 (Interrogatory No. 1 from  
9 Plaintiffs' Third Set of Interrogatories to All Defendants). This request for summary judgment is  
10 pending before Plaintiffs are able to determine who to depose and who to collect documents from for  
11 the CTI Class's claims.  
12

13  
14 Plaintiffs need the discovery outlined above to prove their claims. For these reasons and  
15 those detailed below, Plaintiffs should be granted relief pursuant to Rule 56(d).

16 2. The Discoverable Facts Exist.

17 Plaintiffs here have more than a "mere hope that further evidence may develop" in further  
18 discovery. *Freeman*, 827 F. Supp. 2d at 1078 (quoting *Neeley v. St. Paul Fire & Marine Ins. Co.*,  
19 584 F.2d 341, 344 (9th Cir. 1978)). Plaintiffs know that the discoverable facts they seek exist because  
20 the parties have met and conferred about the production of much of the material, and because many  
21 of those facts are referenced in the documents Defendants have already produced.  
22

23 For example, statements in the audited financial statements produced by Defendants show  
24 that there are investment costs that are not contained in the expense ratios given to participants in the  
25 relevant disclosures. *See, e.g.*, Declaration of Randall Edwards (ECF No. 79-1) ("Edwards Decl.")  
26 Ex. U, at BAIRD\_0000836 (footnoting, in an audited financial statement for 2016 that "the expenses  
27 incurred by underlying funds in which the [BlackRock collective trust] fund invests are not included  
28

1 in this [expense] ratio. The collective fund income allocated to the [BlackRock collective trust] fund  
2 from underlying funds is net of those expenses.”). This supports Plaintiffs’ allegations that  
3 Defendants hid substantial fees and expenses from participants, because many of the alleged costs  
4 are not quantified in these financial statements or other produced documents. This also indicates that  
5 additional information exists regarding the amount of those costs, which must be discovered.  
6

7 Similarly, Defendants’ own documents reference two other examples of hidden investment  
8 costs that participants pay: soft-dollar payments<sup>9</sup> and broker-dealer commissions.<sup>10</sup> The audited  
9 financial statements do not quantify soft-dollar or broker-dealer costs, and bundle them into the  
10 proceeds and costs of buying and selling securities. Plaintiffs have outstanding Interrogatories, RFAs  
11 and RFPs aimed at discovering these types of compensation, among others. *Id.* ¶¶ 8-9.  
12

13 Finally, there is a dispute about what share classes the BlackRock Plan participated in. DOL  
14 filings prepared by BlackRock indicate that the BlackRock Plan participated in share classes that  
15 directly charged the BlackRock Plan additional investment management fees (in addition to all  
16 indirect fees and expenses, including but not limited to the 50% securities lending fee). *See* AC ¶  
17 139-46. Defendants maintain that the BlackRock Plan only participated in the “F” class of every  
18 proprietary collective trust fund, which does not *directly* charge an investment management fee to  
19 participants (again saying nothing about Plaintiffs’ allegations regarding the multitude of indirect  
20 fees). Certain documents suggest that the BlackRock Plan only invested in the F class of the  
21 collective trust funds offered as investment options, but others, including DOL filings, are in conflict  
22  
23

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24 <sup>9</sup> Defendants’ documents indicate that BTC receives soft-dollar compensation, as alleged in the  
25 Amended Complaint. *See, e.g.*, Edwards Decl., Ex. CC, at BAIRD\_0001710 (page titled “Soft  
26 Dollars” within the “16 Things You Should Know: Information About BTC”); AC ¶ 105. Soft-dollar  
27 compensation involves BTC using BlackRock CTI assets to pay for things like information or  
28 technology that BTC otherwise would have to pay for out of pocket.

<sup>10</sup> BlackRock Plan participants’ investment returns are reduced by costs paid to broker-dealers. AC ¶  
105. The Investment Management Agreement discloses payments made with BlackRock Plan assets  
to BlackRock affiliates like BlackRock Execution Services. Edwards Decl. Ex. T, at Baird\_0000366.



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